

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-973

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v.

Union County

No. 12 CRS 052470

JOSHUA WILFORD HOUSER

Appeal by defendant from judgment entered 27 February 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 21 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

INMAN, Judge.

Joshua Wilford Houser (“defendant”) appeals from judgment entered after a jury found him guilty of felony child abuse inflicting serious bodily injury. The jury also found the existence of two aggravating factors—that the crime was especially heinous, atrocious, or cruel (“EHAC”) and that the victim was very young—and the trial court sentenced defendant in the aggravated range. On appeal, defendant argues that: (1) the trial court committed plain error in allowing an investigating officer to testify as to his opinion of defendant’s guilt; (2) the trial court committed

plain error in admitting evidence showing that defendant asserted his right to counsel during an interrogation; (3) the trial court committed plain error by failing to give a full jury instruction on the aggravating factor of EHAC; and (4) the trial court reversibly erred by failing to conduct a charge conference during the penalty phase of the trial.

After careful review, we find no error in the guilt-innocence phase of the proceedings, no plain error in the trial court's EHAC instruction, and no material prejudice in the trial court's failure to fully comply with the statutory mandate to conduct a charge conference.

Background

Defendant lived with his wife, Kirbi Davenport ("Ms. Davenport"), and Ms. Davenport's three-year-old daughter from a previous relationship, K.D.,¹ in a mobile home in Indian Trail near Ms. Davenport's parents.

On 16 May 2012, defendant stayed home to watch K.D. while Ms. Davenport was at work. Ms. Davenport called at 2:30 p.m. and spoke with K.D., who sounded normal and said she was having a good day. Ms. Davenport's mother called and spoke with K.D. at 5:30 p.m.; K.D. said she had eaten, taken a bath, and was waiting for her mother to come home.

¹ In its brief on appeal, the State included a footnote explaining why it referred to the minor victim by her full name. Defendant filed a motion to strike this footnote, which we allow. This Court's policy is to use initials or pseudonyms when referring to minor victims of abuse to protect the privacy and identity of the child. *See, e.g., State v. Ridgeway*, 185 N.C. App. 423, 426, n.1, 648 S.E.2d 886, 889, n.1 (2007). The State's arguments against following this policy here refer to matters outside the record and are irrelevant to our analysis in this case.

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At 6:07 p.m. defendant called 911. Defendant told the dispatcher that K.D. had urinated in her clothes, fallen from a standing position, and injured her head. Defendant said he picked her up and shook her but she was nonresponsive. The 911 dispatcher alerted the Union County Sheriff's department because defendant's "extremely hectic and excited" demeanor made the dispatcher uncomfortable and raised his suspicion that a crime may have occurred.

Emergency personnel arrived at 6:17 p.m. K.D. was in the front seat of a truck parked outside the home. EMTs noticed that she was not breathing properly and that her eyes had rolled toward the top of her head. In a statement prepared approximately an hour after arriving at the scene, emergency rescue volunteer Robert Holloway wrote that defendant told him that K.D. had fallen and hit her chin.

Defendant told Ms. Davenport on the phone that he heard a thud when K.D. went into the bathroom to clean herself up after urinating in her pants. He said that K.D. was getting up off the floor when he walked into the bedroom. When defendant scooped her up and took her pants off, K.D. keeled backward and defecated on herself. Defendant claimed that he punched a hole in the wall because the 911 dispatcher could not understand him when he was trying to give his address. Volunteers thought defendant seemed calm and detached until he spoke on the phone to his wife, at which time he raised his voice to seem anxious and

nervous. Ms. Davenport's mother also testified that defendant exhibited no emotion later at the hospital.

K.D. arrived at the hospital in a coma. The attending neurosurgeon noted that internal blood visible on the CT scan reflected a recent injury, not one days or weeks old. The doctor noticed two types of skull fractures, the first being a diastatic fracture on the suture line in the skull that grows and molds together by the time the child is 18 months old. The suture line had been broken apart, an injury which the doctor testified required significant force. The second fracture was a crack running through the hard portion of the skull. K.D. also had bleeding on both sides of her head, in between the lobes of her brain, and under the lining of the brain.

Immediate surgery was needed to remove blood clots, stop bleeding, and treat the swelling in K.D.'s brain. After removing a portion of K.D.'s skull, the doctor removed blood clots and blood that had soaked in between the lobes of K.D.'s brain. During the procedure, K.D.'s brain swelled outward between one half of an inch to an inch beyond her skull. The continued swelling required further cutting from the skull, but even then, K.D.'s brain was so swollen that the doctors had difficulty replacing K.D.'s scalp after surgery.

K.D. was in the hospital for a total of 65 days. Due to the injuries to her brain, she was no longer able to walk, stand up on her own, hold up her head, or feed herself, and she became incontinent. For six months after surgery, K.D. required a tracheotomy tube in her neck to help her breathe. She required around

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the clock care, which her mother and grandmother provided. The neurosurgeon testified that K.D.'s brain injuries were of the most severe kind, resembling those that can be inflicted by ejection from a car, war wounds, or a fall from a significant height.

Shortly after riding with K.D. to the hospital, defendant returned to his home with Lieutenant Brian Helms of the Union County Sheriff's Department ("Lt. Helms") and Special Agent Brandon Blackman of the State Bureau of Investigation ("Special Agent Blackman"). They photographed the interior of the home, including the hole in the sheetrock of the master bedroom next to the master bathroom door. After being asked about the hole in the sheetrock by the officers, defendant said he had punched it in frustration when the 911 operator couldn't understand what he was saying over the telephone. Defendant asked the officers to leave when they intimated a belief that he had hurt K.D.

Later, Special Agent Blackman reviewed the photographs and saw what appeared to be blonde hair in the hole of the sheetrock. He testified that this was inconsistent with defendant's statement that defendant had created the hole with his fist, causing the officers to seek consent from Ms. Davenport to search the home and collect the hair. Lt. Helms and Special Agent Blackman went back to the home with Crime Scene Investigator Chris McTeague ("McTeague"). McTeague removed two head hairs from the sheetrock, which he testified were not laying on top of the rock but were partially embedded and provided resistance when he tried to pull

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them from the damaged area. Subsequent DNA analysis showed that the hairs belonged to K.D. Both hairs were anagen phase hairs, meaning that they were actively growing when they were removed and would have required force to be pulled from K.D.'s head.

Defendant was arrested following the collection of the hairs. He waived his *Miranda* rights and agreed to give a recorded interview to detectives with the Union County Sheriff's Office. When officers accused him of hurting K.D., he asserted his right to counsel and ended the interview.

Defendant testified at trial that while he was cooking dinner on the night in question, K.D. told him that she needed to "pee." Defendant saw that her pants were already wet, so he "popped" her on the "butt" and told her to go into the master bathroom to wash up. He then heard a thud from the bathroom, and when he looked in, he saw K.D. trying to get up from her hands and knees. Defendant tried to hold her up, but K.D. went stiff and defecated on herself. Defendant then cleaned K.D. and called 911. He claimed that he punched the wall in frustration when the 911 dispatcher couldn't understand him, causing the hole in the sheetrock.

The jury found defendant guilty of felony child abuse inflicting serious bodily injury. The trial court then proceeded with a separate penalty phase necessary for the jury to determine the existence of aggravating factors alleged by the State.²

² The jury was not informed that the State sought to pursue aggravating factors until after it returned its guilty verdict.

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After the jury found beyond a reasonable doubt that the crime was especially heinous, atrocious or cruel and that the victim was very young, the trial court sentenced defendant in the aggravated range to 92 to 123 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

I. Officer Testimony

Defendant first argues that the trial court committed plain error by admitting testimony from Lt. Helms that the existence of K.D.'s hairs in the sheetrock of the home was inconsistent with defendant's account of the incident. After careful review, we find no error.

Because defendant did not object to the admission of Lt. Helms's testimony, we review for plain error. *See State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007). "To show plain error, the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice." *State v. Elkins*, 210 N.C. App. 110, 119, 707 S.E.2d 744, 751-52 (2011) (citation and quotation marks omitted); *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Lay witness testimony in the form of opinions or inferences "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the

determination of a fact in issue.” N.C. Gen. Stat. § 8C, Rule 701 (2013). Thus, when police officers testify as lay witnesses, they are not permitted to invade the province of the jury by commenting on the credibility of the defendant. *See, e.g., State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 360 (2003).

This Court’s reasoning in *State v. O’Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), is persuasive. In *O’Hanlan*, the Court hold there was no error in the admission of a police officer’s testimony that he did not fully investigate a rape with forensic analysis because the victim positively identified the defendant as the perpetrator. *Id.* at 562-63, 570 S.E.2d at 761-62. Specifically, the officer testified as follows:

Q. There was a lot of questions here from counsel for the defendant about the fact that you didn’t send this off, you didn’t send that off, you didn’t do this or that check. What can you tell this jury about why you didn’t have these things checked?

A. I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died--

[Defense Counsel]: Objection, Your Honor, speculative.

[Court]: Overruled.

Q. Go ahead?

A. . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn’t have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761. Although defendant argued on appeal that the officer's statements were tantamount to expert testimony that the defendant committed the crime, the Court rejected that argument based on the context of the testimony and the fact that the officer was not tendered as an expert:

The context in which this testimony was given makes it clear [the officer] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. His testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping, and rape. His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.

Id. at 562-63, 570 S.E.2d at 761-62. Accordingly, the Court held that the officer's testimony was permissible as lay opinion testimony under Rule 701. *Id.*

Here, defendant challenges the admission of the following testimony provided by Lt. Helms:

Q: Lieutenant Helms, what else did you do with Special Agent Blackman after reviewing the 911 call?

A: We began – or I say we, Special Agent Blackman began reviewing the photographs I had taken the night before. And in doing so, he asked me to step into his office to show me something.

Q: Okay, what did he show you?

A: One of the pictures that we had looked at earlier, and that's in the photographs is when we first saw that

hair.

Q: Okay. And what did you note about the hair in that photograph?

A: That it appeared to be blonde.

Q: And why was that significant noting the hair in this photograph?

A: Because [K.D.] was – had blonde hair.

...

Q: Lieutenant Helms, as a trained investigator and detective, in your opinion was the hair being in that sheetrock wall consistent with the version of the defendant's as to how that hole got there?

A: No.

Q: What did you do after you made that discovery?

A: I got a hold of a couple of other detectives . . . and asked them to locate [Ms. Davenport] at the hospital and try to obtain consent for us to go back into the home to collect the hair.

Like the officer in *O'Hannon*, Lt. Helms was not invading the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, he was explaining the investigative process that led the officers to return to the home and collect the hair sample. Contrary to defendant's arguments, Lt. Helms's testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. Lt. Helms's testimony served to

provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. Like the testimony in *O'Hannon*, these statements were rationally based on Lt. Helms's experience as a detective and were helpful to the jury in understanding the investigative process in this case. Accordingly, pursuant to *O'Hannon*, we reject defendant's assertion that Lt. Helms's statements were tantamount to expert testimony or impermissible opinion testimony, and we hold that the trial court's admission of this testimony was not error, let alone plain error. *See Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751.

II. Invocation of the Right to Counsel

Defendant next argues that the trial court committed plain error by admitting evidence that, during the interrogation following his arrest, defendant invoked his right to counsel. With no objection from defendant at trial, the State offered and the trial court admitted into evidence a video recording of the post-arrest interrogation showing that the officers stopped their questioning when defendant said "I want a lawyer."

The invocation of the right to counsel is a constitutional privilege that cannot be admitted into evidence to be used against a defendant. *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983). However, failure to raise this constitutional issue before the trial court bars appellate review. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) (dismissing the contention on appeal that the

trial court committed plain error by admitting evidence of the defendant's invocation of the right to counsel because the issue had not been raised at trial). Here, defendant failed to object to the admission of the video showing his invocation of the right to counsel and did not raise this constitutional issue presented on appeal to the trial court. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Global*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (internal citations omitted). Accordingly, we dismiss this assignment of error.³

III. Especially Heinous, Atrocious or Cruel Instruction

Defendant next argues that the trial court committed plain error by failing to provide an adequate instruction on the EHAC aggravating factor.

Although defendant does not specifically state the basis for this contention in his brief on appeal, we believe that this issue is whether the trial court's instruction regarding EHAC was unconstitutionally vague. We base this determination on defendant's citation to and reliance on cases from both the North Carolina Supreme Court and United States Supreme Court that assessed whether similar instructions in capital cases violated those defendants' constitutional rights. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398 (1980); *Proffitt v. Florida*, 428 U.S. 242, 49

³ We decline to exercise our discretionary authority under Rule 2 of the North Carolina Rules of Appellate Procedure to address this issue. *See* N.C. R. App. P. 2 (2015) ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]").

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L. Ed. 2d 913 (1976); *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511 (1990); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993); *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). Defendant argues that “[j]ust as proper definition of the terms is required in capital sentencing to narrowly channel jury discretion, an instruction must be given in non-capital jury proceedings to ensure the return of a reliable verdict.”

Defendant failed to raise this constitutional argument before the trial court, failed to offer any argument regarding this issue in the trial court, and did not object at all to the trial court’s instructions during the penalty phase. In *State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 317 (1999), our Supreme Court declined to reach the issue defendant now asks us to consider based on that same failure:

Next, defendant argues that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, both on its face and as applied, and thus the trial court’s instruction to the jury regarding the aggravator was unconstitutional. Defendant, however, failed to object to this instruction at trial. Thus, pursuant to N.C. R. App. P. 10(b)(1), she has not properly preserved the issue for review by this Court. Likewise, defendant made no constitutional claims at trial regarding this instruction and will not be heard on any constitutional grounds now. *State v. Benson*, 323 N.C. 318, 321–22, 372 S.E.2d 517, 519 (1988).

However, because we believe that the trial court erred in failing to define EHAC in its instructions to jurors, we will exercise our discretion under Rule 2 to reach this

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issue. *See State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (noting that this Court may “pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction” pursuant to Rule 2).

Because defendant did not object to the trial court’s instruction on EHAC, our standard of review remains plain error. *See State v. Lemons*, 352 N.C. 87, 92, 96-96, 530 S.E.2d 542, 545, 547-48 (2000) (reviewing an unpreserved constitutional argument for plain error where the Court exercised its discretionary authority under Rule 2 to reach the issue).

The North Carolina Pattern Jury Instruction regarding the EHAC aggravating factor in the capital context provides as follows:

In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

N.C.P.I. Crim.—150.10(9). There is no separate pattern instruction defining this aggravating factor in non-capital cases. However, our Supreme Court has held that “it is instructive to turn to our capital cases for a definition of an especially heinous,

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atrocious, or cruel offense.” *State v. Blackwelder*, 309 N.C. 410, 413, 306 S.E.2d 783, 786 (1983).

Our Supreme Court has also repeatedly held that this pattern instruction provides “constitutionally sufficient guidance to the jury” as to what the words “especially heinous, atrocious, or cruel” mean. *Tirado*, 358 N.C. at 596-97; 599 S.E.2d at 545; *see also Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141. These provisions “incorporate narrowing definitions adopted by [our Supreme Court] and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved[.]” *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141.

The trial court here did not adapt this pattern instruction from the capital case instructions in its charge to the jury, and provided jurors with none of the approved “narrowing definitions” that are constitutionally required to limit the jury’s discretion in finding this aggravating factor. The entire instruction on EHAC consisted of the following conclusory mandate: “If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet.” The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 362-64, 100 L. Ed. 2d 372, 378-79 (1988) (holding that the phrase “especially heinous, atrocious, or

cruel” was unconstitutionally vague on its face and as applied without narrowing definitions that limited the jury’s discretion in considering that aggravating factor). Therefore, the trial court erred in failing to define EHAC in its instructions to jurors during the penalty phase of the trial.

However, under plain error review, defendant has the burden of demonstrating “not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice.” *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52 (citations and internal quotation marks omitted). Defendant has failed to carry that burden here. In non-capital cases, the determination of whether EHAC exists is focused on “whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*.” *Blackwelder*, 309 N.C. at 413-14, 306 S.E.2d at 786. Here, the State presented substantial evidence that defendant, K.D.’s caregiver, slammed K.D.’s head into a wall of their home with enough force to break sheetrock and rupture the child’s skull in two places. K.D. responded to pain stimuli during the beginning of her ambulance transport to the ER, but she gradually grew less responsive and arrived at the hospital in a deep coma. Her injuries required surgical removal of large pieces of her skull to relieve bleeding in her brain, which swelled beyond her skull and protruded roughly one inch from her head. Despite immediate aggressive medical intervention, K.D. could

no longer live the life of a normal three-year-old girl. Nor could her life ever again be normal or without suffering. An MRI conducted a few days after surgery showed that K.D. suffered damage to almost every portion of her brain. Her neurosurgeon testified that K.D.'s personality, motivation, speech, memory, and vision would all be permanently affected. Photographs admitted at trial showed K.D. grimacing in pain from the tracheotomy tube inserted into her neck to assist with breathing. As of the date of trial, K.D. could no longer stand, walk, hold up her head, use her hands, or control her bladder or bowel movements.

Therefore, in light of evidence that supports all four factors identified by the *Blackwelder* Court—excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious bodily injury—we cannot conclude that the jury “probably” would have reached a different verdict had it been fully instructed on EHAC. Nor do we believe that the error, in the context of this evidence, was “so fundamental that it caused a miscarriage of justice.” *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52. We discern no plain error.

IV. Charge Conference

Defendant's final argument on appeal is that the trial court reversibly erred by failing to conduct a charge conference as required by statute before instructing the jury during the penalty phase of the proceedings. We agree that the trial court

failed to fully comply with the applicable statute, but we hold that defendant has failed to show material prejudice.

Although defendant did not request a charge conference before the trial court instructed the jury on aggravating factors during the penalty phase, and although defendant raised no objection at trial on this ground, this issue is properly before us. “[H]olding a charge conference is mandatory, and a trial court’s failure to do so is reviewable on appeal even in the absence of an objection at trial.” *State v. Hill*, __ N.C. App. __, __, 760 S.E.2d 85, 89, *disc. review denied*, __ N.C. __, 766 S.E.2d 637 (2014).

N.C. Gen. Stat. § 15A-1231(b) (2013) provides:

Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury.

In *Hill*, this Court held that the statutory mandate in section 15A-1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before proceeding to instruct the jury on aggravating factors during the penalty phase of a non-capital case. *Hill*, __ N.C. App. at __, 760 S.E.2d at 89-90.

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We agree with defendant that the trial court did not conduct a full charge conference here. Outside the presence of the jury, the trial court engaged in the following colloquy before proceeding with the penalty phase:

THE COURT: All right. Let the record reflect the jury is out of the hearing of this Court. I notice in the file, it's my understanding that the State is preparing to argue for aggravating factors, aggravating factor statutorily listed as number eight, that the offense was especially heinous, atrocious, or cruel; and number twelve, the victim or the child was very young. Is that correct?

[THE STATE]: That's correct, Your Honor. Those are the two aggravating factors that the State wishes to proceed on, and the State did file notice of our intent to proceed with these aggravating factors on December 5th of 2013.

THE COURT: All right. And it's my understanding you are not preparing or asking the Court to submit a third aggravating factor which seems to have the same elements as the crime. Is that right –

...

[THE STATE]: That's right, Your Honor.

THE COURT: All right, thank you. All right, anything from the State further on the charge conference?

[THE STATE]: No, Your Honor.

THE COURT: From the defendant?

[DEFENSE COUNSEL]: Your Honor, my client has asked me to object to the verdict sheet because it does not correspond to the indictment, so I'm kind of just doing that for the record, Your Honor.

THE COURT: Thank you. Anything further for the

record? Let's bring the jury back in.

The jurors were then brought back into the court room to hear argument from counsel and instructions from the trial court, without the trial court first informing counsel of the substance of those instructions.

As the *Hill* Court noted, “[t]he purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and reaching the correct verdict.” *Hill*, __ N.C. App. at __, 760 S.E.2d at 89 (internal quotation marks omitted). Here, prior to instructing the jury, the trial court apprised both parties of the aggravating factors that the State sought to pursue, referring to its colloquy with counsel as a “charge conference.” After instructing the jury and before deliberations began, the trial court asked counsel whether there was anything further from the State or the defendant. Therefore, unlike in *Hill*, the trial court did not completely fail to comply with section 15A-1231(b), because it informed the parties of the aggravating factors that it would charge, it gave counsel a general opportunity to be heard at the charge conference, and it gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to “know what instructions will be given,” and thus did not “comply fully” with all provisions of section 15A-1231(b). *See Hill*, __ N.C. App. at __, 760 S.E.2d at 88-89.

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Under section 15A-1231(b), “[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.” Although our Courts have not yet defined what it means for a defendant’s case to have been “materially prejudiced” by the trial court’s failure to fully comply with section 15A-1231(b), our Supreme Court has held that defense counsel’s failure to object to jury instructions at trial had bearing on the issue of prejudice in the context of the trial court’s failure to record the charge conference. *See State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (1990) (holding that where both sides indicated they were satisfied with the charge and the defendant did not object to the instructions at trial, despite having the opportunity to do so, the defendant could not establish material prejudice on appeal); *see also State v. Wiley*, 355 N.C. 592, 631, 565 S.E.2d 22, 49 (2002) (“As in *Wise*, defendant in the instant case may not assign error to the lack of recordation where he had the opportunity to object to the charge but declined to do so.”). Consistent with our Supreme Court’s emphasis on the opportunity to object, the *Hill* Court found that the defendant suffered material prejudice because, in addition to failing to conduct any semblance of a charge conference, the trial court did not give counsel an opportunity to object to the charge at the close of instructions. *Hill*, __ N.C. App. at __, 760 S.E.2d at 90.

The trial court here did not err so egregiously. It conducted what it referred to as a “charge conference,” during which it conferred with counsel regarding the

specific aggravating factors that it would charge to the jury. The trial court asked counsel if either of them wished to be heard before the jury was charged, opening the door for counsel to tender proposed instructions or to ask about instructions. Furthermore, the trial court specifically asked defense counsel if there was anything further before allowing the jury to begin deliberations, opening the door for objection to the instructions if defendant had one.

Given the opportunity that defendant had to correct the trial court's inadequate EHAC instruction after the jury had been charged, and also considering the aforementioned overwhelming evidence supporting the jury's finding of EHAC in this case, we cannot conclude that defendant has demonstrated material prejudice resulting from the trial court's failure to comply fully with section 15A-1231(b).

Conclusion

After careful review, we hold that the trial court did not err in its evidentiary rulings during the guilt-innocence phase of the underlying proceedings. In light of the evidence presented by the State, we also hold that the trial court did not commit plain error by giving an unconstitutionally vague instruction, and defendant was not materially prejudiced by the trial court's failure to fully comply with section 15A-1231(b).

NO PREJUDICIAL ERROR.

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Judges STEELMAN and DIETZ concur.